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BEFORE THE ARIZONA CORPORATION COMMISSION

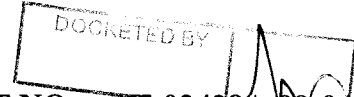
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Arizona Corporation Commission
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**IN THE MATTER OF THE COMPLAINT
 OF AT&T COMMUNICATIONS OF THE
 MOUNTAIN STATES, INC. AGAINST
 U S WEST COMMUNICATIONS, INC.
 REGARDING ACCESS SERVICE**

DOCKET NO. ~~T-024284-99-0476~~
T-01051B-99-0476

**AT&T'S RESPONSE TO U S WEST'S
 MOTION TO STAY PROCEEDING,
 OR IN THE ALTERNATIVE, TO
 SEVER CLAIMS**

AT&T Communications of the Mountain States, Inc. ("AT&T") hereby submits its response to U S WEST Communications, Inc.'s ("U S WEST") Motion to Stay Proceeding Pending FCC Decision on Preemption, or in the Alternative, to Sever Claims Relating to Interstate Services ("U S WEST's Motion"). AT&T requests that the Arizona Corporation Commission ("Commission") deny U S WEST's Motion. In support thereof, AT&T states the following.

I. INTRODUCTION

This case is about service quality. AT&T seeks relief under Arizona state statutes from the problems it has been experiencing as a customer of U S WEST's access services. The Complaint concerns service and facilities ordered from U S WEST to enable AT&T to provide service to AT&T's Arizona customers. AT&T's Complaint outlines U S WEST's failures regarding access service, including: (1) an unwillingness to provide facilities necessary for access services; (2) an unwillingness to timely provision facilities; (3) practices that favor itself, its affiliates and its own customers; and (4)

maintaining unreasonable differences as to access services between localities and classes of services when deciding where to provision facilities. AT&T also alleges that U S WEST fails to comply with the Service Quality Plan tariff.

U S WEST's conduct, as described in the Complaint, violates Arizona statutes and tariffs. *See* AT&T's Complaint ¶¶ 61-83. AT&T asks the Commission in this proceeding to investigate U S WEST's service quality with regard to its access services under the authority of these statutes and to provide relief by ordering U S WEST to (1) comply with its tariffs; (2) immediately fill all outstanding held orders; (3) provide just, adequate, efficient and reasonable access facilities; (4) cease granting preferences to itself and its affiliates; (5) cease its practice of maintaining unreasonable differences between its wholesale and retail customers; (6) cease its practice of maintaining unreasonable as to service and facilities between localities; and (7) file several monthly reports with the Commission and AT&T informing them of the status of its provision of service and its plans to remedy problems in a timely manner. *See* AT&T's Complaint, Prayer for Relief. To address the discrimination issues, AT&T also asks the Commission to require U S WEST to inform the Commission in monthly reports of its performance in providing service to itself and its affiliates as compared to its provision of service to AT&T and other interexchange carriers.

U S WEST now asks the Commission to stay the proceeding pending a decision by the Federal Communications Commission ("FCC") on U S WEST's Petition for Declaratory Ruling. In the alternative, U S WEST seeks to preclude the Commission from investigating or enforcing any of the above state law requirements for access services which are ordered out of U S WEST's interstate access tariff on file with the

FCC (U S WEST's FCC Tariff No. 5). By seeking to sever issues of service quality for facilities used in Arizona but ordered out of the interstate tariff, U S WEST further asks the Commission to preclude from evidence at the hearing any information concerning services or facilities ordered from U S WEST's FCC tariff.

In essence, U S WEST asks the Commission to reshape AT&T's Complaint by excising all allegations and evidence related to access services ordered under its FCC tariff. This is merely an attempt by U S WEST to suggest to this Commission that its problems with the provision of access services here in Arizona are not as serious as they are. The effect of the motion is to summarily limit the scope of the Commission's jurisdiction and authority to investigate and enforce state law requirements relating to the quality of service provided by U S WEST to the consumers of the state of Arizona.

For the reasons that follow, AT&T asks the Commission to reject U S WEST's Motion, to find instead that it has jurisdiction to consider the totality of AT&T's Complaint, and to provide the relief AT&T requests.

II. ARGUMENT

The Commission has jurisdiction to investigate and resolve complaints over the reasonableness and adequacy of U S WEST's access services and facilities, the refusal of U S WEST to provide access facilities, and the unjust discrimination of U S WEST against certain Arizona wholesale customers and in favor of itself or its affiliates.

AT&T's Complaint filed in this proceeding is nearly identical to the Complaint filed in 1997. The only difference between the two proceedings is that the 1997 Complaint involved only dedicated access facilities, whereas this Complaint specifically alleges unlawful service with regard to both dedicated access facilities and switched

access facilities. (See Complaint, ¶¶ 4, 5, and 7.) As detailed in AT&T's Complaint, U S WEST unilaterally terminated the settlement agreement that the parties reached in the previous case and consequently has forced AT&T to bring yet another complaint here in Arizona to obtain the quality of service that it needs and is lawfully entitled to. The Commission should continue to exercise its jurisdiction over AT&T's claims.

The Commission already exercises jurisdiction over the service quality of essentially the same services purchased by U S WEST's retail customers. This action simply asks the Commission to provide AT&T with essentially the same service quality protections that this Commission affords U S WEST's Arizona end users. A.R.S. § 40-334(B) specifically prohibits discrimination between classes of customers. It would be discriminatory for the Commission to decline to exercise its jurisdiction over the same services provided by U S WEST to interexchange carriers like AT&T in Arizona.

U S WEST argues that the Commission's authority over service quality stops, however, at the point where AT&T's claims rest on services it ordered out of the FCC tariff. This should not persuade this Commission to change its mind about the scope of its jurisdiction. First, the scope of the Commission's investigative authority under A.R.S. §§ 40-202, 40-203, 40-321 and 40-331 is extremely broad. The language of these statutes is not limited to those services provided by a telephone company pursuant to its intrastate tariffs.

Second, U S WEST's argument conflicts with federal law. The federal Telecommunications Act of 1996 grants state commissions authority to impose requirements necessary "to protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers." 47

U.S.C. § 253(b). A.R.S. § 40-321 permits the Commission to determine “just, reasonable, safe, proper, adequate or sufficient” facilities and service. A.R.S. § 40-331 also provides the Commission with authority to order additions or improvements, or changes to existing plant, that might reasonably be made to provide the security and convenience to the public. Therefore, AT&T’s claims are proper under both federal and state law.

More importantly, the fact that the access service might be ordered under U S WEST’s FCC tariff does not make all of the traffic provided by that service “interstate traffic.” A single access facility carries both intrastate and interstate traffic. Both the FCC and Arizona tariffs of U S WEST require the application of a “Percent of Interstate Use” or “PIU” factor to ensure pricing will reflect the dual function of the access facility. *See* U S WEST’s Arizona Access Tariff, §§ 2.3.11-2.3.12 (Nov. 11, 1995); U S WEST’s FCC Tariff No. 5, § 2.3.12 (July 27, 1994). The PIU factors and tariffs merely reflect the FCC’s regulation for apportioning access costs for facilities which carry both interstate and intrastate traffic. 47 C.F.R. § 36.154.

In other words, even if the traffic is 89% intrastate in nature, the customer is nonetheless billed under the terms of the interstate tariff. U S WEST argues the Commission has no authority over the facilities providing the service, although 89% of the traffic is intrastate. In fact, in 1997 and 1998, AT&T paid U S WEST a significant amount of money for intrastate access services in Arizona. Just as the intrastate nature of services is considered for pricing, the Commission must consider the intrastate nature of those services for regulatory and oversight purposes. The PIU factor defeats U S WEST’s argument that this Commission has no jurisdiction over facilities and services purchased

out of its FCC tariff, or should ignore these services and facilities when reviewing AT&T's Complaint.

Furthermore, U S WEST's argument that this Commission should not consider in its investigation those services and facilities ordered by AT&T under its FCC tariff is premised on false presumption that AT&T's claims are tied to the specific "held" and "missed" orders that are listed on the Exhibits produced in response to U S WEST's Motion for More Definite Statement. The Commission should refuse U S WEST's attempt to myopically focus on the particular held orders listed in AT&T's response to the Motion for More Definite Statement. From AT&T's perspective, this case is not tied to treatment by U S WEST of the particular list of AT&T's held orders, but instead is an attempt to obtain relief from recurring service problems AT&T experiences with U S WEST access services. The "held orders" and "missed orders" that AT&T references in its Complaint are only examples of the continuing service problem. Certainly AT&T is asking the Commission to order U S WEST to fill those held orders that continue to be outstanding. More importantly, however, AT&T is here to ask the Commission to help resolve the ongoing service problem.

AT&T has filed similar complaints in Washington, Colorado, Minnesota and New Mexico. No state commission to date has agreed with U S WEST's arguments limiting state commission jurisdiction over access service quality. A preliminary ruling from the Commission Hearing Division indicates that Commission agrees that it has jurisdiction over in-state service quality issues:

The filed rate doctrine does not preempt the Commission's jurisdiction in this matter. Contrary to the claims of U S WEST, through the Tariff, the Commission has imposed terms and conditions for the provision of

service, and penalties if the conditions were not met. Furthermore, in addition to the provision in the Tariff cited by AT&T, Section 2.4.2.A, in relevant part provides:

‘Basic Service Standard

As part of its obligation to provide adequate basic telephone service, the Company shall construct and maintain its telecommunications network so that the instrumentalities, equipment, and facilities within the network shall be adequate, efficient, just and reasonable in all respects in order to provide each customer within its service area with the following services or capabilities:

5. Access to toll services’

Procedural Order (Oct. 20, 1999) at 3.

The filed rate doctrine, on which U S WEST relies on in its Petition for Declaratory Ruling at the FCC and relied on in its Motion for More Definite Statement, Motion for Extension, and in the Alternative, Motion for Partial Summary Judgement,¹ simply states that tariffed services must be provided and priced consistent with the tariff. *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 118 S.Ct. 1956, 1998 (1998). The doctrine restricts only the common law remedies of customers that purchase services under tariffs, and it seeks primarily to protect against unreasonable and discriminatory charges. *Id.* at 1962. In fact, the *Central Office* case simply rejected contract and tort claims that would have granted preferential treatment to Central Office. AT&T has brought neither contract nor tort claims against U S WEST. Moreover, AT&T does not seek preferential treatment. Rather, AT&T asks the Commission to require U S WEST to comply with its tariffs and to provide services and facilities in accordance with Arizona state statutes that govern telephone companies.

The United States Supreme Court, in the *Central Office* case, held that a purchaser’s rights and remedies are governed by statute and tariff, not common law. *Id.*

¹ See AT&T’s Response to U S West’s Motion, at 7-9.

at 1964. AT&T's Complaint falls squarely within Arizona statutory requirements and Commission rules. It would be quite an anomaly if a carrier could—through its tariffs—indemnify itself against regulatory oversight and all violations of the laws in the State of Arizona.

Two other state commissions that considered this argument by U S WEST expressly rejected it and found that *Central Office* did not preclude them from exercising jurisdiction over the service quality of services.

In Washington, the Commission found, in pertinent part:

We do not believe that the Supreme Court's *Central Office* decision as to the filed-rate doctrine speaks to or controls the decision we make. Among other considerations, the plaintiff there was a private citizen and a customer under the tariff, not another agency of government with regulatory responsibilities that are specifically preserved in federal law. The matters litigated in that proceeding involved financial aspects of the service, and such matters are appropriate for inclusion in tariffs. The filed-rate doctrine addresses common-law remedies. The cited decision simply did not address the question we face.

The Commission in the past has examined a similar "10% rule" and billing by competitive access providers selling unswitched interstate and intrastate services exclusively pursuant to a federal tariff. The Commission found that telecommunications companies offering intrastate service were not exempt from registering with the Commission despite offering services exclusively under federal pricing regulation.

This is consistent with Section 2(b) of the Communications Act of 1934. With certain irrelevant exceptions, that section says that nothing in the Communications Act of 1934 shall be construed to give the FCC jurisdiction over charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communications service.²

The FCC has not in any way clearly provided that it preempts state regulatory agencies from inquiring into the matters that AT&T raises. In the absence of clear authority that a customer's election to take service under a federal tariff per the "ten percent rule" preempts all state regulatory authority, we decline to so rule. We do expect that the

² Section 2(b) of the Communications Act of 1934, Ch. 652, Title I, Sec. 2(b), 48 Stat 1064, codified as amended at 47 U.S.C. Sec/ 152(b)(1994).

evidence will demonstrate a sufficient volume of intrastate traffic to warrant our proceeding to a decision on the issues presented.

Order Denying Motion to Dismiss, Washington Utilities and Transportation Commission,

Docket No. UT-991292 (November 12, 1999) at pp. 4-5. Similarly, the Colorado

Commission found:

U S WEST's primary claim is that the Federal Communications Commission ("FCC") has exclusive jurisdiction over most of the held service orders since all but one or two of them were purchased by AT&T out of U S WEST's federal tariff. U S WEST cites the case of *AT&T v. Central Office Telephone*, 524 U.S. 214, 118 S.Ct. 1956 (1998). AT&T opposes the motion suggesting that the FCC's jurisdiction is not exclusive. In addition, AT&T notes that summary judgment is a drastic remedy, to be provided only when there are no genuine issue of material fact.

The ALJ's review of the Supreme Court's decision in the *Central Office Telephone* case does not support granting the Motion for Summary Judgment at this time. The *Central Office Telephone* involved a plaintiff asserting claims for a breach of promises for subjects covered in tariffs, but the promises were for things different than specified in the tariff, e.g., faster response than called for in a tariff. In this proceeding, AT&T has alleged many things, including refusal to construct facilities and refusal to provision sufficient equipment, and failure to make timely additions to the network which are not tied to a specific held order. These claims do not necessarily arise specifically from the federal tariff and are thus not within the purview of the *Central Office Telephone* case. In addition, U S WEST has cited no case for the proposition that this Commission may not use federal tariffs as guidance in conjunction with evaluating claims of inadequate service under State law.

There is a difference between primary jurisdiction and exclusive jurisdiction as well. For example, this Commission has held that the primary jurisdiction for interpreting certificates of public convenience and necessity previously issued by the Interstate Commerce Commission, now issued by the Federal Highway Administration, is in the federal realm. However, in appropriate circumstances this Commission interprets those certificates in determining whether a carrier is complying with Federal and/or State law. (citations omitted)

Finally, there remain genuine issues of material fact as to what actions U S WEST is taking or not taking in the provision of access services which are within the realm of the complaint. There are also issues of fact

as to the nature of the traffic to be transported on the circuits. Therefore, it is inappropriate to grant summary judgment and the motion is denied.

Interim Order of Administrative Law Judge Ken F. Kirkpatrick Establishing Procedures, Colorado Public Utilities Commission, Docket No. 99F-404T (November 15, 1999) at pp.4-5.

All that AT&T seeks in its Complaint is for the Arizona Commission to investigate U S WEST's violations of Arizona law and take the appropriate enforcement action upon finding such violations. The Commission, in fact, has a constitutional and statutory obligation to do just that regardless of the tariff governing the service.

U S WEST also requests that the Commission sever all claims relating to services and facilities purchased by AT&T under U S WEST's FCC tariff. The Commission should deny this request. U S WEST's severance argument is based on the same reasoning as its jurisdictional argument. Just as the Commission has jurisdiction to regulate the quality of services purchased out of U S WEST's FCC tariff, the Commission should consider information relating to those services to determine whether a problem exists, and what, if anything to do about it. This evidence is relevant to the issues before the Commission concerning the quality of U S WEST's access services provided to Arizona customers like AT&T.

III. CONCLUSION

For the foregoing reasons, AT&T requests that the Commission deny U S WEST's Motion for a Stay. For the same reasons, the Commission should also deny U S WEST's request to sever claims regarding services or facilities purchased from U S WEST's tariff on file with the FCC.

Respectfully submitted this 3rd day of January, 2000.

**AT&T COMMUNICATIONS OF THE
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CERTIFICATE OF SERVICE

I hereby certify that the original and 10 copies of AT&T's Response to U S WEST's Motion to Stay Proceeding, or in the Alternative, to Sever Claims in Docket No. T-01051B-99-0476, were sent via overnight delivery this 3rd day of January, 2000 to:

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and that a true and correct copy of the foregoing was sent via overnight delivery this 3rd day of January, 2000 to the following:

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